IN THE

Supreme Court of the United States

October Term, 1942

No.....

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,
Petitioners and Respondents Below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

No opinion was rendered in the court below in connection with its order of June 1, 1942, nor in connection with its order overruling petitioners' application for rehearing on October 6, 1942.

II.

JURISDICTION

1. The date of the order to be reviewed is October 6, 1942. (Record, p. 599.)

2. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240, as last amended by Act of Congress approved June 7, 1934, C. 426, 48 Stat. 926 (Title 28, Sec. 347(a) U. S. C. A.).

3. The cases believed to sustain the jurisdiction of this court are as follows:

National Labor Relations Board vs. Link-Belt Co., 311 U. S. 584; *National Labor Relations Board vs. Ford Motor Company*, 305 U. S. 364; *National Labor Relations Board vs. Bell Oil & Gas Co.*, (C. C. A. 5th) 91 Fed. (2d) 509; *National Labor Relations Board vs. Tex-O-Kan Flour Mill*, 122 Fed. (2d) 433.

III.

STATEMENT OF THE CASE

The original parties to this proceeding are Metal Polishers International Union and the petitioners, The Gerity-Whitaker Company of Toledo, Ohio, and Gerity-Adrian Manufacturing Corporation of Adrian, Michigan. The Town of Adrian, Michigan, is located about thirty-seven miles northwest of the City of Toledo, Ohio. The Gerity-Whitaker Company was chartered in 1921, under Ohio law, as The Gerity-Whitaker-Nagle Company with an authorized capital stock of $25,000. Gerity-Adrian Manufacturing Corporation was chartered in March, 1937, as a Michigan corporation and had an issued capital stock of $10,000. The Gerity-Whitaker Company for the past fifteen years has been owned and controlled by James J. Gerity of Toledo. Gerity-Adrian Manufacturing Corporation has been continuously and solely owned by James Gerity, Jr., of Adrian, Michigan. James J. Gerity is the father of James Gerity, Jr. The father is about seventy-three years of age and the son is about thirty-eight years of age.

The Gerity-Whitaker Company was the outgrowth of a partnership of three metal polishers, James J. Gerity, William Whitaker and James E. Nagle. Nagle left the company about seven years after incorporation and established his own business in Toledo. Whitaker left the com-

pany about eight years after its incorporation and likewise set up his own business and both former partners thereafter competed with The Gerity-Whitaker Company. (Record, p. 378.) These facts are pertinent and material as will subsequently appear.

About 1927 or 1928, James Gerity, Jr., began to take an active part in his father's business. By 1934 James Gerity, Jr., had developed some production business with automobile manufacturers in Michigan. During the last four or five years, Gerity, Jr., was associated with his father in The Gerity-Whitaker Company, serious disagreements developed as to the fundamental policy to be maintained in the type of work or production the company would handle. Gerity, Sr., contended that the business should be directed to and specialize in job plating. This work consists principally of replating silver, bronze and copper articles from which the original finish was cracked, chipped or rusted. It also included a small amount of new plating for local industries, but such work was never large in the value of any single order or contract.

Gerity, Jr., insisted upon transforming the business of The Gerity-Whitaker Company into production work. He believed that the company should purchase the raw metal castings for plating and resell the finished casting to manufacturers. He developed a business for small metal articles in the automobile trade such as hub caps, radiator ornaments, the metal part of the steering wheel, etc. Sales of such articles would be in quantities running to 20,000 or 30,000 or more. This type of business was not steady and regular, but seasonal and competitive. Gerity, Sr., opposed the transformation of his business into production work because it represented an altogether different line of work than that he had produced during the thirty years or more prior to the change. By its very nature, production work required temporary hiring of extra employees over the

periods of major activity in the automobile business. After the company produced 20,000 or 30,000 parts it might have on order, then employment would be reduced from perhaps one hundred employees to twenty-five to thirty-five. During the periods of maximum production, the responsibility for the completion and delivery of orders rested upon James J. Gerity, a man then approaching seventy years of age. The strain and responsibility was more than he felt he could endure and as a consequence he repeatedly warned and threatened his son, James Gerity, Jr., that he would quit the production business and refuse to handle it longer.

As a matter of fact, The Gerity-Whitaker Company substantially reduced its production work in the latter part of 1937. Since 1938, The Gerity-Whitaker Company has operated a job plating shop rather than a production plating shop. It is true that the volume of business transacted in recent years and the number of employees hired is greatly less than during the years preceding 1937. However, the work handled is job plating and being of smaller volume does not require the employment of a great number of platers and polishers. (Record, pp. 388-454 to 457.)

In the face of the threats of Gerity, Sr., to discontinue the operation of a production shop, Gerity, Jr., in March, 1936, rented a small garage in the Village of Blissfield, Michigan, at a monthly rental of Twenty-five Dollars and decided to set up his own business in that location. At the same time he advised his father that he was getting out to run his own business and requested that The Gerity-Whitaker Company have an accounting of his 50% interest in accumulated profits. Gerity, Sr., advised his son that the company did not have the cash to make the settlement and that he did not propose to borrow the money to finance it. He offered to let his son have whatever equipment or material he might need in lieu of cash and any other help his company could provide. (Record, pp. 387-388 and 454-

455.) The books of The Gerity-Whitaker Company disclose that machinery and equipment of the net value of $1,854.28 was charged to James Gerity, Jr. (Record, p. 223.) With this machinery and equipment, Gerity, Jr., set up a small shop in Blissfield, hired four or five workmen and eventually was obliged to move out of the garage building in Blissfield to larger quarters in the City of Adrian, Michigan, due to the expansion of his business. (Record, pp. 388-391, 456.) Four years after Gerity, Jr., commenced his business with four helpers in the Village of Blissfield, he was employing more than several hundred men in his factory in Adrian. (Record, p. 118.) Since the metal plating industry is now dormant due to the discontinuance of automobile production and other priorities and restrictions, Gerity-Adrian Manufacturing Corporation has transformed its operations into new fields of production, and James Gerity, Jr., and Gerity-Adrian are now working on the production of shell casings, armor plate and other war essentials. The Gerity-Whitaker Company is still confining its operations to job plating, all of which is consistent with the declarations made by Gerity, Sr., more than seven or eight years ago.

The complaint charges that Gerity-Adrian Manufacturing Corporation was the agent and "*alter ego*" of The Gerity-Whitaker Company and that it was a branch plant or runaway shop established to circumvent a contract of Gerity-Whitaker Company with Metal Polishers Union. The evidence shows (Record, p. 457) that neither James J. Gerity nor The Gerity-Whitaker Company from March, 1936, to February, 1940 (time of hearing) had received any compensation, dividend, or payment of any consideration in any form or medium whatsoever from Gerity-Adrian Manufacturing Corporation or James Gerity, Jr.; that Gerity, Sr., had never been consulted concerning any business transacted by Gerity, Jr., in Blissfield or Adrian,

Michigan; that he had never advised or suggested the establishment of a shop in Blissfield and had never directed, dominated or in any way controlled James Gerity, Jr., or Gerity-Adrian Manufacturing Corporation after March, 1936, when Gerity, Jr., leased the garage and set up a shop in Blissfield. (Record, pp. 394 to 397-456.) It further appears that Gerity, Jr., has not managed, directed or controlled, directly or indirectly, the business, affairs or policy of The Gerity-Whitaker Company and that he received nothing from The Gerity-Whitaker Company except an adjustment of his claim for profits or salary which had accumulated prior to his separation from The Gerity-Whitaker Company or accrued on work in process and under order immediately subsequent thereto. A statement of the assets and liabilities of James Gerity, Jr., as of April 1, 1937, the date on which the books of Gerity-Adrian Manufacturing Corporation were opened, appears on page 579 of the record.

The complaint charges that The Gerity-Whitaker Company established a runaway shop or branch plant in April, 1936, for the purpose of avoiding a contract with Metal Polishers Union. At about this time, March, 1936, The Gerity-Whitaker Company was employing approximately fifty-two men weekly. In the fall of 1936, the Gerity-Whitaker Company was employing temporarily from one hundred twenty to one hundred twenty-eight men per week. It was stipulated by the parties (Record, p. 321) as follows:

> Gerity-Whitaker labor payroll in the year 1934 was $59,219;
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> Gerity-Whitaker labor payroll in the year 1935 was $51,492;
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> Gerity-Whitaker labor payroll in the year 1936 was $68,406;
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> Gerity-Whitaker labor payroll in the year 1937 was $52,167.

Thus, the total for the two years preceding the establish-

ment of the so-called runaway shop was $111,000, while for the next two years the payroll was $121,000.

It is conceded by the Board (Record p. 121) that immediately prior to January 1, 1937, The Gerity-Whitaker Company was giving employment to three times the normal number of employees hired. In this connection, the Board in its findings of fact says:

> "Shortly thereafter, on January 15, 1937, about eighty employees were laid off at the Toledo plant, which for the preceding ten weeks had been employing about three times its normal complement of thirty to forty employees."

The Gerity-Whitaker Company had written working agreements with Metal Polishers Union during the years 1935, 1936 and 1937. The first complaint by the Union against The Gerity-Whitaker Company was in the summer of 1936 when it was rumored that The Gerity-Whitaker Company was moving some equipment to Blissfield, Michigan. (Record, pp. 185-186-187.) Prior to the summer of 1936, there were no complaints by the Union concerning layoffs, refusal to bargain, working conditions or rates of pay. (Record, p. 406.) The business agent of the Union testified (Record, p. 185): "We had best experience with one another and cooperation."

In the summer of 1936, it was testified (Record, p. 187) that the Union officials found four polishers working in Blissfield "And we put up the proposition to him (Jim Gerity, Jr.) that the men had taken a strike vote and it looked very serious, that we considered putting this plant up into Michigan and hiring polishers and buffers for less money than what he was paying in Toledo, was detrimental to us." This statement sums up the case against these petitioners. According to Mr. Englert, business agent of the Union, James Gerity, Jr., had no right to establish or undertake to operate his own business. He was tied into

The Gerity-Whitaker Company and as long as he stayed in the metal polishing business, he could not divorce himself from that company. The fact that he might have an ambition to found and develop his own business was not permissible. The fact that he was the owner of one share of stock of The Gerity-Whitaker Company would forever make him a part of The Gerity-Whitaker Company. We think the position of the Union, as declared above, is not the law and that James Gerity, Jr., was not prohibited from an honest effort to attempt to establish and maintain his own business as time has shown was done so successfully.

We do not suggest or claim that Gerity, Sr., and Gerity, Jr., dealt at arm's length with each other in the details pertaining to the termination of their business association, or that either of them checked and audited the company's books of account or undertook to verify with deliberate care the sum of money which was owed by the company to either of them. As Gerity, Sr., frequently testified, his chief interest so far as the books were concerned was to see that the bills were paid. After all, these men were father and son. They had worked for some years as equal partners in this business. While they could not agree upon their fundamental business policy, still there was no suggestion of mistrust or suspicion, resentment or estrangement in their decision to personally own and conduct their separate enterprises.

The Gerity-Whitaker Company, an Ohio corporation, was never authorized or qualified to do business in the State of Michigan. (Record, p. 491.) If this company was actually "doing business in the State of Michigan" it could have been penalized under Michigan law by the nullification of every transaction consummated between April 1936 and March 1937.

Within three years of the time James Gerity, Jr., left The Gerity-Whitaker Company, he had developed the pro-

duction and sale of numerous articles never before manufactured or sold by The Gerity-Whitaker Company and had secured substantially more than four hundred new accounts with whom The Gerity-Whitaker Company had never transacted business. (Record, p. 408—Ex. 2, p. 565.)

IV.

SPECIFICATIONS OF ERROR

1. Said Circuit Court of Appeals erred in holding that the Board's finding that The Gerity-Whitaker Company transferred operations to Blissfield and Adrian, Michigan, to evade obligations under a contract with the Union and set up a "runaway shop" in violation of Sec. 8(5) of the Act was supported by substantial evidence.

2. Said Circuit Court of Appeals erred in holding that the Board's finding that Gerity-Adrian Manufacturing Corporation was the *"alter ego"* and agent of The Gerity-Whitaker Company and was founded and established by Gerity-Whitaker Company to interfere with, restrain and coerce its employees in violation of Section 8(1) of the Act as it is not supported by substantial evidence and its conclusion of law ordering reinstatement with back pay allowance to thirty-one designated persons is erroneous.

3. The remedy invoked by the Board upon its findings of fact and conclusions of law is an unlawful order and said Court of Appeals erred in holding that the conclusions of law were justified and lawful and that the remedy invoked was a lawful remedy either warranted by law or the provisions of the Act.

V.

ARGUMENT

Point 1. Said Circuit Court of Appeals Erred in Holding that the Board's Finding that The Gerity-Whitaker Company Transferred Operations to Blissfield and Adrian, Michigan, to Evade Obligations under a Contract with the Union and Set Up a "Runaway Shop" in Violation of Sec. 8(5) of the Act was Supported by Substantial Evidence.

The accusation in the complaint that The Gerity-Whitaker Company transferred business operations from Toledo into the State of Michigan to avoid its contract with the Union is the keystone of the case. If the Board has failed to prove by substantial evidence that the petitioners established and set up a runaway shop to avoid its contract, then the other charges of the complaint are without a base or foundation. The particulars of this specific charge are set forth in paragraph 12 of the complaint, as follows:

> "On or about March, 1936, respondent, Gerity-Whitaker, intending to establish a branch plant at the Village of Blissfield, Michigan, and desiring to engage new employees and at lower rates of pay than prevailing at its Toledo plant by virtue of the aforesaid agreement with the Metal Polishers, sought from the Metal Polishers an agreement to refrain from organizing or soliciting the membership of the employees to be engaged at Blissfield, and upon its representation that the operations to be conducted at Blissfield would not result in any diminution of employment at the Toledo plant and would be confined solely to manufacture for certain specified purposes, obtained such agreement from the Metal Polishers and said respondent did thereafter establish and operate such branch plant at Blissfield until January, 1937."

The complaint then proceeds to charge that the alleged solicitation of the Union not to organize employees at Bliss-

field was unlawful and a violation of Section 7 of the Act and an infraction of Section 8(1) of the Act. It should be noted that it is charged that Gerity-Whitaker Company sought the agreement preliminary to setting up and opening a shop in Blissfield; that before it did so, it secured a promise from the Union that the men to be hired in Blissfield would not be organized. No attempt was ever made by the Board or the Union to prove the allegation of this paragraph of the complaint. However, it was felt essential to incorporate the charge in the complaint in order to have it appear that James Gerity, Jr., had recognized the Union's right to jurisdiction over the territory in which Blissfield and Adrian, Michigan, are located.

Of course the evidence shows that The Gerity-Whitaker Company, as a company, knew nothing about the plan of James Gerity, Jr., to rent a garage and hire five or six men to work for him in Blissfield until after the business was commenced. Furthermore, the first objection or issue or complaint concerning this so-called "runaway shop," in the words of George Englert, business agent of the Union, who testified with the aid of records, "First complaint was during the summer of 1936" when he talked about it to James Gerity, Jr. (Record, p. 187.)

Therefore, the fact is clearly shown that there was no understanding or agreement between the Gerity-Whitaker Company and the Union with reference to employment at Blissfield or as to limitation of employment or guarantee of no decrease of employment in Toledo because Gerity-Whitaker Company (James J. Gerity) knew nothing of Blissfield until after the shop had been opened and the Union never met with James J. Gerity concerning Blissfield and did not meet with the owner of the shop, James Gerity, Jr., until not less than four or five months after the business had been in operation. Thus, the initial attempt to connect The Gerity-Whitaker Company with the

so-called "runaway shop" utterly fails of proof and the Board's evidence in this respect clearly disproves the pertinent allegations of the complaint and confirms the testimony of James J. Gerity and James Gerity, Jr., that there was no understanding, plan or scheme discussed, arranged or devised to establish the Blissfield shop. It further appears beyond all reasonable doubt that the Blissfield shop was wholly conceived, planned and executed by James Gerity, Jr., after he became convinced that James J. Gerity had definitely decided to discontinue the operation of a production shop.

The evidence is uncontroverted that during the years 1934, 1935, 1936 and 1937, written working agreements between petitioners and the Union were in effect. The business agent of the Union testified (Record, p. 185): "We had best experience with one another and cooperation." The first complaint by the Union against The Gerity-Whitaker Company was in the summer of 1936, when it was rumored that Gerity, Jr., was moving some equipment to Blissfield. (Record, pp. 185, 186, 187.) This shop in Blissfield constituted the entire complaint of the Union against The Gerity-Whitaker Company. There were no charges, prior to the summer of 1936, concerning layoffs, working conditions, rates of pay or refusal to bargain. It was testified that in the summer of 1936, Union officials found four polishers working in Blissfield, "And we put up the proposition to him (James Gerity, Jr.) that the men had taken a strike vote and it looked very serious, that we considered putting this plant up into Michigan and hiring polishers and buffers for less money than what he was paying in Toledo, was detrimental to us."

If James Gerity, Jr., was actually trying to establish his own business in Blissfield in 1936, then the threats of the Union were unlawful and coercive. Possibly Gerity may have tried to induce the Union in the latter part of

1936 and during 1937 to refrain from calling a strike at The Gerity-Whitaker Company. This was a natural desire on his part not to have James J. Gerity (Gerity-Whitaker Company) penalized by labor trouble in consequence of his attempt to operate his Blissfield shop. Possibly he might have indicated that his Blissfield shop would not reduce the volume of employment by The Gerity-Whitaker Company. According to the stipulated evidence and the Board's findings of fact (Record, p. 121), The Gerity-Whitaker Company was giving employment in the last four months of 1936 "To three times its normal complement of thirty to forty employees."

These comments on the evidence negative the charge of the establishment of a branch plant or runaway shop. They prove that the evidence does not sustain the acts charged against the petitioners in the complaint. This evidence establishes that there was no labor difficulty to escape by the transfer of operations to another locality and the record shows by stipulated original records that instead of employment being decreased in 1936, the number of workers employed and the amount expended for payroll was greater than for some years in the business of The Gerity-Whitaker Company.

In its answer to the complaint (Record, pp. 44, 45, 46), The Gerity-Whitaker Company sets forth the facts giving rise to the severance of business relations between The Gerity-Whitaker Company and James Gerity, Jr., or as between father and son. The answer declares that the only reasons for the establishment of a business in Michigan by James Gerity, Jr., was a basic dispute as to business policy, *i.e.*, whether The Gerity-Whitaker Company should continue to operate as a production plating shop. Further, it appears that James J. Gerity refused to divide the capital stock with his son and that he had warned his son that

he would discontinue the operation of a production shop on account of the mental and physical strain to himself as he was charged with responsibility for production. He further objected to risking the capital involved in such production business and insisted that it was his personal desire, at his advanced age, to confine his business to that of a job plating shop.

As against the arguments and reasons of the father for desiring to limit and decrease the volume of business, Gerity, Jr., desired to eliminate the handling by The Gerity-Whitaker Company of job plating and to solely devote operations to production work. The evidence showed beyond controversy that while Gerity, Jr., desired to manage and direct the business, his father continued to dominate and insisted upon his own policies; that the father would not divide the capital stock; that he vetoed plans and changes either proposed or initiated by his son; that the father discharged technical experts, an accountant and chemist, insisting he could not stand the expense; that he opposed the investment of money and new and more efficient equipment; that he persistently threatened to reject production orders obtained by Gerity, Jr., and frequently warned and invited his son to leave The Gerity-Whitaker Company and operate his own business. (Record, pp. 232-386 to 391-407-445 to 454.) In consequence, Gerity, Jr., had no alternative than to undertake to operate on his own responsibility, but as he testified (Record, p. 469): "I never discussed nor thought of it even." (Transfer of the business of The Gerity-Whitaker Company from Toledo to another location to escape contract with Union.)

Thus it appears from the undisputed evidence that there were no underlying conditions in the affairs of The Gerity-Whitaker Company and in its labor relations during the year 1936 to prompt or cause it to establish a branch

plant or runaway shop. On the contrary, the establishment of a branch plant with consequent division of authority, added financial risk and opportunity for James Gerity, Jr., to expend his father's money, establish a production shop and put into effect his personal ideas as to business policy were the very things James J. Gerity most violently opposed and resisted.

In the history of labor controversies involving the establishment of runaway shops or branch plants, the termination of operations in the original location and the resumption of operations in a new location, the facts invariably disclose that labor controversies exist with lockouts, strikes and other difficulties in progress. Under such circumstances, employers have endeavored to circumvent collective bargaining by the transfer of operations to a new location and have shut down their business and operations in the home plant.

Here, there was no dispute or labor trouble,—no cessation or diminution of employment. The only controversy was between the owners or operators of The Gerity-Whitaker Company and this issue alone prompted the opening of a small shop in Blissfield by James Gerity, Jr. For the ten months immediately following the establishment of the Blissfield shop, the record shows that The Gerity-Whitaker Company employed more men and had a larger payroll than during the preceding two years; that for approximately three months in 1936, it employed more than twice its average number of employees; that during the entire year of 1937 its total payroll and employment was only 10% less than the average employment and payroll for the years 1934 to 1937, inclusive; that for a period of twenty-two months, beginning with March, 1936, the employment and payroll of Gerity-Whitaker Company was greater than at any time in the company's history. (Record, p. 321.)

Point 2. The Finding of the Board that Gerity-Adrian Manufacturing Corporation was the "Alter Ego" and Agent of The Gerity-Whitaker Company and was Founded by The Gerity-Whitaker Company to Interfere With, Restrain and Coerce Its Employees in Violation of Section 8(1) of the Act is not Supported by Substantial Evidence and its Conclusion of Law and Order for Reinstatement with Back Pay Allowances to Thirty-One Designated Persons is Erroneous.

This point raises the question as to whether or not The Gerity-Whitaker Company or James J. Gerity, its owner, are or were since March, 1936, beneficially interested in Gerity-Adrian Manufacturing Corporation and whether or not they managed, promoted, dominated or directed the business and affairs of Gerity-Adrian. The undisputed evidence (Record, pp. 395 to 397) shows that James J. Gerity owns no stock and has no interest in Gerity-Adrian and has never received any consideration from it by way of salary, commission, dividend or otherwise; that Gerity, Jr., subscribed the entire capital stock of Gerity-Adrian and has continuously and solely owned the same; that while Gerity, Jr., made his father a director of his company, it was merely a mark of respect of son for father; that Gerity, Sr., was not consulted about the matter, was not present when appointed, never attended a meeting of Gerity-Adrian, never conferred with his son as to any act, decision or policy of Gerity-Adrian or as to operations in Michigan (Record, pp. 395 and 423); that when Gerity, Jr., in the year 1940 decided to construct a substantial factory in the City of Adrian and borrow a considerable sum of money to finance the construction, his father knew nothing concerning the proposed factory or its financing until after the building was under construction and the loan had been made. (Record, p. 458.)

No representative of the Board has ever claimed, in

argument or otherwise, that James J. Gerity or The Gerity-Whitaker Company had any interest in, control over or participated in the creation, management and operation of Gerity-Adrian, or shared in any profits, losses or income of that company. In commenting on this phase of the case, the Trial Examiner finds (Record, p. 61): "It is undisputed that Gerity, Sr., had little, if anything, to say about the business."

It has been charged and concluded by the Board that The Gerity-Whitaker Company transferred machinery and equipment into Michigan to establish a branch plant. The record shows that while The Gerity-Whitaker Company sold a small amount of machinery and equipment to James Gerity, Jr., and charged him with the depreciated value of such property, James Gerity, Jr., and Gerity-Adrian had an investment in machinery and equipment in March, 1937, of $13,750.00. (Record, p. 579.) Of this total approximately $1,800.00 of such machinery and equipment was obtained from The Gerity-Whitaker Company, as aforesaid. (Record, p. 126.) Eighty-five per cent of such machinery and equipment was purchased and paid for by James Gerity, Jr., upon his own credit and responsibility. The Board itself in its findings of fact declares: "The record also reveals that only about one-tenth of the machinery used by Gerity-Adrian was obtained from the Toledo plant." (Record, p. 126.) Thus, with the record clearly showing that neither The Gerity-Whitaker Company nor James J. Gerity participated in the establishment, management and maintenance of Gerity-Adrian, the evidence further disclosing that neither The Gerity-Whitaker Company nor James J. Gerity ever participated in the income through salary, dividends or otherwise, and it being shown by the Board's conclusion of fact that the machinery and equipment secured by James Gerity, Jr., from The Gerity-Whitaker Company was only about 10% of his investment in such property, then the conclusion that Gerity-

Adrian Manufacturing Corporation was the *"alter ego"* of The Gerity-Whitaker Company clearly appears to be an unfounded and groundless finding of fact and an erroneous conclusion of law.

If Gerity-Adrian Manufacturing Corporation was not a branch plant and the *"alter ego"* of The Gerity-Whitaker Company, then, James Gerity, Jr., had the lawful right to exercise his discretion in the employment of workmen to operate his business in the State of Michigan. In the case of *National Labor Relations Board vs. Jones & Laughlin Steel Company,* 306 U. S., p. 1, this court declared on pages 45 and 46 of the opinion:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

In the face of the undisputed testimony that no labor disagreement, controversy, refusal to bargain or maintain existing working agreement obtained in March, 1936,—in the light of the undisputed testimony that the only disagreement or dispute existing at that time was between the Geritys and that their differences constituted the true reason for Gerity, Jr., establishing a shop in Michigan, the conclusion inevitably follows that the Board's declaration and decree that Gerity-Adrian was the agent and *alter ego* of Gerity-Whitaker and that Gerity-Whitaker directed its establishment and dominated its operation is an unlawful finding of fact and conclusion of law.

The uncontroverted evidence shows that Gerity, Jr., within three years, developed a far greater volume of trade with diversified products than Gerity, Sr., had created in

more than thirty years' experience in the same general type of business. It further appears that Gerity, Jr., obtained more than four hundred accounts with whom The Gerity-Whitaker Company had never transacted any business. (Record, p. 408.)

In the case of *National Labor Relations Board vs. Bell Oil & Gas Company,* 91 Fed. (2d) 509, the Court of Appeals for the Fifth Circuit, on page 513 of the opinion declares:

> "If the facts found by the Board support its order, and the evidence supports the finding, and if the order is within the scope of the regulatory provisions of the Act, the court will enforce it. If otherwise, it will not do so."
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> "5. It is thus seen that the function of the courts in the operation of the Act is by no means perfunctory. Upon them rests the final responsibility, from them emanates the sole authority, for making the Board's orders coercively effective. Upon them is conferred the jurisdiction, upon them rests the solemn duty to judicially determine finally and for themselves the remedial decree that shall be entered. It is for them to say whether the order the Board has entered will be enforced, or modified and enforced, or set aside in whole or in part. It is only as to the fact findings, when they are supported by the evidence, that the action of the Board is binding upon the courts. On a petition to enforce, it is therefore the duty of the court to determine, in the exercise of an informed judicial discretion, whether, in the light of the Board's findings if they are sustained by the evidence, its order shall be enforced, modified or set aside. * * * It is its duty to decline to enforce it, if in the opinion of the court it is not supported by the law and the facts."

With the foregoing principles of law in mind, we wish to refer briefly to the conclusion of law directing reinstatement with back pay of thirty-one designated persons and the Board's order in consequence of such legal conclusion.

The complaint charges (Record, p. 30, par. 23) that thirty employees were laid off or discharged by The Gerity-Whitaker Company because of a transfer of opera-

tions from Toledo to Michigan. Petitioners deny this charge and answer that seventeen of such employees were hired at least six months after the alleged transfer of operations; that their discharge or layoff had no connection with or relation to the so-called transfer of operations; that if The Gerity-Whitaker Company's business had been transferred, as alleged, the seventeen employees would never have been hired by The Gerity-Whitaker Company. (Record, pp. 465-466.) We quote from the findings of fact of the Board (Record, p. 121) as follows: "Shortly thereafter, on January 15, 1937, about eighty employees were laid off at the Toledo plant, which for the preceding ten weeks had been employing about three times its normal complement of thirty to forty employees." Now the doubling and tripling of employment by The Gerity-Whitaker Company in September, October and November of 1936 was wholly inconsistent with the charge that in March of 1936, it removed operations out of Toledo and into Michigan to escape and circumvent its contract with the Union. As a matter of fact, the Union sent to The Gerity-Whitaker Company during the latter months of 1936 the more than seventy extra employees temporarily hired by Gerity-Whitaker to produce and fill a large order in excess of the normal production capacity of the employees regularly in its employ. These men usually worked in other Toledo plating plants and seized the opportunity to find temporary employment with The Gerity-Whitaker Company when their own employers had no work for them. Among the seventy or more workmen hired for temporary work by The Gerity-Whitaker Company the last four months of 1936, seventeen persons are included among the thirty who now seek reinstatement with back pay from January, 1937, on the theory that the transfer of operations by Gerity-Whitaker Company to Michigan in March, 1936, conferred the right to obtain reinstatement to a temporary job, with back pay for a matter of three to five years.

We quoted from the Board's findings that The Gerity-Whitaker Company normally employed thirty to forty workmen. By reference to Exhibit 41 (Record, pp. 560-561) we find that from January to December 24, 1937, The Gerity-Whitaker Company employed less than thirty men during only six weeks of that year; that during twenty-three weeks more than forty employees were on its payroll. Thus, it appears that for practically two years after the alleged establishment of a runaway shop, The Gerity-Whitaker Company continued to employ "its normal complement of thirty to forty workmen." Exhibit 40 further shows that of the thirty employees named in the complaint, but thirteen had been employed by The Gerity-Whitaker Company before October, 1936. There is no dispute as to the fact that The Gerity-Whitaker Company, after September, 1936, hired seventeen of the persons who joined in the complaint. Admittedly, they were not hired because of a transfer of operations to Michigan nor were they hired because the volume of production had been decreased. The only rational conclusion from the undisputed evidence is that they secured employment with Gerity-Whitaker, temporary or continuing, not because of an alleged transfer of operations into Michigan, but for reasons wholly inconsistent and directly opposed to every claim and contention of the Board since the beginning of this proceeding. Thus, the facts are in absolute conflict with the application of the law and the remedy invoked against the respondents. No justification or legal authority for the inclusion in the order or remedy of reinstatement and back pay allowances to these persons has been suggested by the Board or by the court.

However, in an effort to justify the reinstatement order with back pay allowances, the Board stated (Record, p. 128): "While these sixteen employees were not employed until four or five months after the Blissfield shop had been opened, they were all in its employ before and

after the Adrian plant had been founded." By reference to Exhibit 40 (Record, p. 557), the inexcusable error of the Board in the alleged justification for its order appears. Two of the persons ordered reinstated were not employed until September, 1937, and six or more temporary employees had been laid off about January 1, 1937.

Point 3. The Remedy Invoked by the Board Upon its Findings of Fact and Conclusions of Law is an Unlawful Order and the Court of Appeals Erred in Holding that the Conclusions of Law were Justified and that the Remedy Invoked was a Lawful Order.

It has been recognized that orders for reinstatement of employees with back pay differ from other orders which the Board may properly make under the Act as to the degree of proof necessary to sustain such reinstatement and back pay orders. *National Labor Relations Board vs. Tex-O-Kan Flour Mill Company,* 122 Fed. (2d) 433. This distinction is based upon the fact that such back pay orders "May impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law." It has likewise been held that there must be substantial evidence not only that the purpose of the discharge was to discriminate against Union membership, but also that the unlawful purpose of discrimination had the desired effect, *viz.*: The discouragement of Union membership. *National Labor Relations Board vs. Air Associates, Inc.,* 121 Fed. (2d) 586.

In the case of *National Labor Relations Board vs. National Motor Bearing,* 106 Fed. (2d) 652, the court held:

> "A Board order directing reinstatement of employees will be understood by the court as meaning only those who are such within the Act's definition."

In the Act, Section 2(3), an employee is defined:

> "The term 'employee' * * * shall include any individual whose work has ceased as a consequence of,

> or in connection with any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

It was shown that no labor dispute or controversy existed; that no discrimination or discharge was ever made by The Gerity-Whitaker Company by reason of Union membership in its business. It was further shown that the seventy or eighty employees hired for temporary work in the fall of 1936 were hired for temporary employment to handle an unusual volume of work in excess of the capacity of the employees regularly hired by Gerity-Whitaker. The employees hired were members of and sent to the company by the Union. If the law is applied to the facts, can it be said that these temporary employees, whose term of employment lasted periods of from thirty to ninety days, were laid off in consequence of a current labor dispute or because of an unfair labor practice? Clearly, the normal number of employees, thirty to forty, had first claim, by reason of seniority, to employment with The Gerity-Whitaker Company. Yet, seventeen of the temporary employees are joined as complainants against the petitioner. If all temporary employees were joined in the complaint, then The Gerity-Whitaker Company, on the basis of the Board's order, could be required to reinstate two to three times its normal complement of employees and compensate them for back pay from the date their temporary employment ended on or about January 1, 1937.

It is thus seen that the Board's order is not based upon proof of a decrease in employment due to the establishment of an alleged runaway shop. It further appears that no labor controversy existed at the time James Gerity, Jr., opened a plating shop with four employees in the Village of Blissfield and that no argument arose until four months after this event had occurred; that the proof of the branch plant is without foundation as there is no evidence even

tending to show that James J. Gerity or The Gerity-Whitaker Company has any investment, interest, control or dominion over Gerity-Adrian Manufacturing Corporation. It further appears that the greater number of the complainants are workmen who secured temporary employment despite the charge that operations were transferred into another state and that the order of the Board and the remedy invoked, if carried out and applied to all temporary employees, would obligate the employer to rehire three times its normal number of workmen and compensate with back pay on the same percentage basis.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of *certiorari* and thereafter reversing the decision herein of the Sixth Circuit Court of Appeals in that said court and the Board have not given proper effect to the law and applicable decisions of this court; in that the findings of the Board, its order and the order of said court are not sustained by substantial evidence; in that the questions involved are of general importance and that the order of reinstatement with back pay is in conflict with the particular conditions and principles limiting the application of such remedy, and is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board vs. Air Associates, Inc.*, 121 Fed. (2d) 586.

Respectfully submitted,

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